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No. 91-1922

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

YVONNE E. DEFOOR, FRANK BOWEN et al.,
Petitioners,
vs.
THE STATE OF COLORADO et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Colorado Supreme Court
Case No. 90SA351

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Colorado Supreme Court correctly determined that the rational basis standard of review applied to Petitioner's federal equal protection challenge to the limitations on governmental liability in the Colorado Governmental Immunity Act?

2. Whether the Colorado Supreme Court correctly determined that the limitations on governmental liability in the Colorado Governmental Immunity Act do not deprive Petitioners of their right to substantive due process of law?

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To the Colorado Supreme Court
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Respondents, the State of Colorado, appear through counsel, the Attorney General of Colorado, and urge the Court to deny the Petition for Certiorari filed by Yvonne E. DeFoor et al.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions cited by petitioners, this case involves Colo. Rev. Stat. § 24-10-102 (1988 Repl. Vol.) which provides:

> **24-10-102. Declaration of policy.** It is recognized by the general assembly that the doctrine of sovereign immunity, whereunder the state and its political

subdivisions are often immune from suit for injury suffered by private persons, is, in some instances, an inequitable doctrine. The general assembly also recognizes that the supreme court has abrogated the doctrine of sovereign immunity effective July 1, 1972, and that thereafter the doctrine shall be recognized only to such extent as may be provided by statute. The general assembly also recognizes that the state and its political subdivisions provide essential public services and functions and that unlimited liability could disrupt or make prohibitively expensive the provision of such essential public services and functions. The general assembly further recognizes that the taxpayers would ultimately bear the fiscal burdens of unlimited liability and that limitations on the liability of public entities and public employees are necessary in order to protect the taxpayers against excessive fiscal burdens. It is also recognized that public employees, whether elected or appointed, should be provided with protection from unlimited liability so that such public employees are not discouraged from providing the services or functions required by the citizens or from exercising the powers authorized or required by law. It is further recognized that the state, its political subdivisions, and the public employees of such public entities, by virtue of the services and functions provided, the powers exercised, and the consequences of unlimited liability to the governmental process, should be liable for their actions and those of their agents only to such an extent and subject to such conditions as are provided by this article. The general assembly also recognizes the desirability of including within one article all the circumstances under which the state, any of its political subdivisions, or the public employees of such public entities may be liable in

actions which lie in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by a claimant and that the distinction for liability purposes between governmental and proprietary functions should be abolished.

STATEMENT OF THE CASE AND FACTS

This case is an interpleader action, brought pursuant to Colo. R. Civ. P. 22, intended to permit the trial court to determine the appropriate distribution of the maximum amount available from the Colorado Risk Management Fund for tort claims against the State of Colorado arising from a single occurrence. The case derives from a catastrophic accident on U.S. Highway 40 in Grand County, Colorado, on August 10, 1987. A Colorado Department of Highways employee was removing a large rock from the roadside when the rock rolled down a hillside and struck a tour bus on the road below. Nine people were killed and 19 others were injured. Subsequently, the Office of the Colorado Attorney General received numerous notices of claim pursuant to the Colorado Governmental Immunity Act for damages resulting from this accident. The damages claimed far exceeded the $400,000 statutory limit of liability, established by the Colorado General Assembly in Colo. Rev. Stat. § 24-10-114(1)(b) (1988 Repl. Vol.).

In the trial court, Petitioners moved for summary judgment on the grounds that the limitation of liability statute was unconstitutional as violative of their equal protection and substantive due process rights, among other grounds asserted. Petitioners argued that the court should apply heightened, or intermediate, scrutiny in its analysis of their constitutional claims. The trial court declined to do so and applied the rational basis standard of review. The trial court found the statute constitutional and not violative of equal protection guarantees or the right to substantive due process of law.

Petitioners appealed directly to the Colorado Supreme Court. On February 3, 1992, that court affirmed the decision of the trial court. In doing so, the court applied the rational basis standard of review and found no violation of equal protection guarantees or substantive due process rights. This decision is published at 824 P.2d 783.

STATEMENT OF RELATED CASES

In case number 91-1877, individual Colorado Department of Highways employees, who were brought into this case as third-party defendants by Petitioners, filed a petition for certiorari relative to the Colorado Supreme Court decision referenced above, on the issue of the validity of the civil rights claims asserted against them and their entitlement to qualified immunity from those claims.

REASONS WHY THE PETITION FOR CERTIORARI SHOULD BE DENIED

The Petitioners fail to establish any important federal issues which are worthy of consideration by this Court. The decision of the Colorado Supreme Court below is in full accord with the applicable federal Constitutional standards; the history of governmental immunity in Colorado provided the court below with ample precedent for its decision; and the result is accurate.

A. No Conflict Exists Among the States Regarding the Standard of Review Applicable to Federal Equal Protection Claims.

In *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 65 (1978) this Court addressed the issue of the applicable standard of review for statutes which limit liability to persons seeking to recover damages for personal injuries. The appellees in *Duke Power* made the same argument to this Court that the present petitioners make regarding the appropriate standard of review applicable to their federal equal protection claim: "Appellees, however, urge a more elevated standard of review on the grounds that the interests jeopardized by the Price-Anderson Act 'are far more important than those in the economic due process and business-oriented cases' where the traditional rationality standard has been invoked." 438 U.S. at 84.

The argument for an elevated standard of review was rejected by the Court on the basis of its understanding of the intent of Congress when the Price-Anderson Act was passed. The Court found that Congressional intent governed the characterization of the liability limitation provision as an economic regulation reflecting "a legislative effort to structure and accommodate 'the burdens and benefits of economic life.'" *Id.* This precise analysis was applied by the Colorado Supreme Court in reaching its conclusion that petitioners' federal equal protection claims should be subject to rational basis review. *Colorado v. DeFoor*, 824 P.2d 783, 787-790 (Colo. 1992). Relying upon the legislative declaration of policy in Colo. Rev. Stat. § 24-10-102 (1988 Repl. Vol.), its prior decision in *Lee v. Colorado Department of Health*, 718 P.2d 221, 227-28 (Colo. 1986), and this Court's decision in *Dandridge v. Williams*, 397 U.S. 471, 485 (1970), the Colorado Supreme Court found that Colo. Rev. Stat. § 24-10-114(1) (1988 Repl. Vol.) is "rationally related to the legitimate state interests of fiscal solvency and provision of essential

services while minimizing taxpayer burdens." 824 P.2d at 790. The Colorado Governmental Immunity Act reflects the efforts of the Colorado General Assembly to structure and accommodate the burdens and benefits of economic life in Colorado. Colo. Rev. Stat. § 24-10-102 (1988 Repl. Vol.)

Other courts have considered statutes limiting recovery from governmental tortfeasors, applied the rational basis test and found that the statutes met the federal Constitutional standard: *Grimes v. Pearl River Valley Water Supply District*, 930 F.2d 441 (5th Cir. 1991); *Caman v. City of Stanford*, 746 F. Supp. 248 (D. Conn. 1990); *Hale v. City of Portland*, 783 P.2d 596 (Or. 1989); *Snyder v. City of Minneapolis*, 441 N.W.2d (Minn. 1989); *Lienhard v. State*, 431 N.W.2d 861 (Minn. 1988); *Wilson v. Gipson*, 753 P.2d 1349 (Okla. 1988); *Sadler v. New Castle County*, 524 A.2d 18 (Del. Super. Ct. 1987), *aff'd.*, 565 A.2d 917 (Del. 1989); *Stout v. Grand Prarie Independent School District*, 733 S.W.2d 290 (Tex. App. 1987), *cert. denied* 485 U.S. 907 (1983); *Ryszkiewicz v. City of New Britain*, 479 A.2d 793 (Conn. 1984); *Leliefield v. Johnson*, 104 Idaho 357, 659 P.2d 111 (1983); *Cauley v. City of Jacksonville*, 403 So.2d 379 (Fla. 1981); *Sambs v. City of Brookfield*, 293 N.W.2d 504 (Wisc. 1980).

In many of these cases, the plaintiff urged the court to apply intermediate scrutiny to their federal equal protection claim on the basis that recovery of damages for personal injuries was an important right even though no fundamental right or suspect classification was implicated by the challenged statute. The federal district court in Connecticut placed this argument in the proper perspective when it found that the right to recover for personal injuries is an "important substantive right" and applied the rational basis test. *Caman*, *supra*, 746 F. Supp. at 250.[1] In each of the cited cases, the standard of

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[1] A particularly apt discussion of the basis for the important substantive right argument and the application of the rational basis test to a statute limiting non-economic damages can be found in *Murphy v. Edmonds*, 325 Md. 342, 601 A.2d 102, 108-13 (1992).

review set forth by this Court in *Duke Power* was applied. The two state courts that applied heightened scrutiny to equal protection challenges to governmental immunity statutes did so pursuant to provisions of their respective state constitutions, without reference to federal standards. *See*: *Condemarin v. University Hospital*, 775 P.2d 348, 352-56 (Utah 1989); *Trujillo v. City of Albequerque*, 798 P.2d 571, 573-578 (N.M. 1990). There exists no conflict among the states regarding the correct standard of review applicable to federal equal protection challenges.[2]

B. There is No Substantive Due Process Right to a Particular Remedy.

The substantive component of the right to due process of law protects those rights deemed fundamental and deeply rooted in the history and tradition of this nation. *Bowers v. Hardwick*, 478 U.S. 190, 192 (1986). There is no fundamental right to full recovery of tort damages. *Duke Power*, *supra*. Nor is there a vested property right to a particular measure of damages. *Fein v. Permanente Medical Group*, 38 Cal.3d 137, 211 Cal. Rptr. 368, 695 P.2d 665, 679 (1985), *appeal dismissed*, 478 U.S. 892 (1985).

Petitioners mistakenly characterize the prospective abrogation of the judicially recognized doctrine of sovereign immunity by the Colorado Supreme Court in *Evans v. Board of County*

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[2]Rational basis review by the Colorado Supreme Court is clearly different from the "extremely deferential" review by the Utah Supreme Court under its state constitution and the "largely toothless" review by the New Mexico Supreme Court under its state constitution. *DeFoor*, *supra*, 824 P.2d at 787 n.4; *Condemarin v. University Hospital*, 775 P.2d 348, 354 (Utah 1990); and *Trujillo v. City of Albequerque*, 110 N.M. 621, 798 P.2d 571, 578 (1990).

Commissioners, 174 Colo. 97, 482 P.2d 968 (1971), as establishing common law remedies for governmental torts. To the contrary, the *Evans* court explicitly recognized that, thereafter, the sole source of any remedies for governmental torts would be legislative enactments of the Colorado General Assembly. 482 P.2d at 972. The *Evans* opinion clearly establishes that there was no common law remedy for governmental torts in Colorado prior to 1971. In response to *Evans*, the Colorado General Assembly exercised its authority, Colo. Const. art. V, § 33, and enacted the Colorado Governmental Immunity Act in 1972.

In its decision below, the Colorado Supreme Court recognized that both the federal and Colorado due process clauses create a property right in a cause of action but not in a particular remedy. *DeFoor*, *supra*, 824 P.2d at 792, *citing Gibbes v. Zimmerman*, 290 U.S. 326, 332 (1933) and *White v. Ainsworth*, 62 Colo. 513, 522, 163 P. 959, 962 (1917). Petitioners continue to confuse the right to a cause of action with the right to a specific remedy. In the absence of a right to a particular remedy, Petitioners have no cognizable property interest protected by the Due Process Clause beyond the limits of liability in the Colorado Governmental Immunity Act.

Nevertheless, Petitioners argue that the remedial statutory scheme embodied in the Colorado Governmental Immunity Act fails to provide an adequate substitute for their ephemeral right to "full recovery" for the damages they suffered as a result of the governmental tort underlying this case. Petitioners claim that an inadequate factual record was presented to the Colorado General Assembly when it considered setting the limits of liability for the state's public entities. Determination of this question of fact will require that this Court delve into the legislative history of the Colorado Governmental Immunity Act as reflected by the record. The record establishes that from the time Colorado was forced to insure itself in 1985, because no commercial insurance company would underwrite the state's insurance needs, until August 1987, no claim paid by or judgment entered against Colorado approached the

established limit of liability in Colo. Rev. Stat. § 24-10-114(1)(b), (Repl. Vol. 1988).

In the two cases challenging the limits of liability, the Colorado Supreme Court endorsed the legislative policy stated in the Governmental Immunity Act, at Colo. Rev. Stat. § 24-10-102 (1988 Repl. Vol.), that the purpose of the act is to provide "fiscal certainty in carrying out the manifold responsibilities of government." *DeFoor*, *supra*, 824 P.2d at 790; *Lee v. Colorado Department of Health*, 718 P.2d 221, 226 (Colo. 1986). On this basis, the court concluded that the aggregate limit of liability is "rationally related to the legitimate state interests of fiscal solvency and provision of essential services while minimizing taxpayer burdens." *DeFoor*, 824 P.2d at 790.

Considering the substantive due process standard that governmental decisions may not be made arbitrarily, this Court stated recently that there is a

> "... presumption that the administration of Government programs is based upon a rational decisionmaking process that takes account of competing social, political, and economic forces. (Citation omitted.) Decisions concerning the allocation of resources to individual programs ... involve a host of policy choices that must be made by locally elected representatives, rather than federal judges interpreting the basic charter of Government for the entire country."

Collins v. City of Harker Heights, Texas, 112 S.Ct. 1061, 1070 (1992). In the absence of wholly arbitrary state action, this Court has consistently admonished federal courts that they have no authority to pass judgment on the wisdom of underlying policy determinations of state legislatures. *E.g.*, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982); *Martinez v. California*, 444 U.S. 277, 283 (1980).

The Petitioners request that the Court ignore this principle of our federal system of government. The limit of liability in the Colorado Governmental Immunity Act reflects an allocative decision within the constitutional powers of the state legislature designed to achieve the stated goal of protecting against the risk of substantial curtailment of governmental functions which unlimited liability would create. Colo. Rev. Stat. § 24-10-102 (1988 Repl. Vol.).

Characterization of the decision in *Condemarin*, *supra*. as creating a conflict between the states is, again, mistaken. The conclusion of the Utah Supreme Court plurality that extension of governmental immunity, including limited liability, to a university hospital was arbitrary and impermissible is not in conflict with the decision of the Colorado Supreme Court in *DeFoor*. The Utah Court based its decision solely on the state constitution and clearly stated that it found federal law neither binding nor helpful. 775 P.2d at 357 n.7. When one state interprets its constitution more strictly than the federal standard, there is no conflict with another state that meets the federal standard; states may adopt constitutional provisions more expansive than those in the federal Constitution. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980). No state or federal court has found a federal substantive due process right to unlimited compensation for governmental torts. The Colorado Supreme Court accurately applied the federal substantive due process standard.

CONCLUSION

The petition for certiorari should be denied.

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